Loh Kam Hon v Ketua Pengarah Kastam Diraja Malaysia

HIGH COURT (IPOH) — CIVIL SUIT NO 22–142 OF 2010
HARMINDAR SINGH JC
4 NOVEMBER 2011

Customs and Excise — Seizure — Seizure of vehicle — Whether there was reasonable cause to suspect vehicle was uncustomed or prohibited vehicle at time of seizure — Whether seizure unlawful — Whether defendant complied with provisions of Act when it deprived plaintiff of vehicle — Whether defendant proven vehicle was smuggled into country — Customs Act 1967 ss 114(1), 128 & 135(1)(d)

The plaintiff was the owner of a BMW car ('the vehicle') that was detained and seized by the defendant pursuant to a notice of seizure ('the notice') issued under s 135(1)(d) of the Customs Act 1967 ('the Act'). The notice stated that the vehicle was seized on the grounds that there was reasonable cause to suspect that the vehicle was an uncustomed or prohibited vehicle at the time it was seized. The plaintiff claimed to be a bona fide purchaser of the vehicle, having purchased the vehicle from one Yanty bt Mohamed through a car dealer. He thus claimed that the detention and seizure of the vehicle was unlawful. The plaintiff made repeated attempts to claim for the return of the vehicle but he received no response from the defendant. The plaintiff then commenced the present action against the defendant where he sought a declaration that the said notice was unlawful, null and void, the return of his vehicle and also compensation for unlawful seizure.

Held, allowing the plaintiff's application with damages to be assessed upon application and costs of RM7,000:

(1) It is trite law that the 'reasonable cause to suspect' provided under s 114(1) of the Act must exist before or at the time of seizure of the vehicle and not anytime after the seizure. However, in the present case the officer who effected the seizure and issued the notice was not called to give evidence as to the reasonable grounds of suspicion that existed for the vehicle to be detained and seized. Further the evidence of the investigation officer showed that the investigations or verifications only commenced after the vehicle was detained and seized. As such, there were no grounds or cause to suspect that the vehicle was an uncustomed or prohibited vehicle at the time it was detained and seized. In the circumstances the detention and seizure of the vehicle was not in

accordance with s 114 of the Act and violated art 13(1) of the Federal Constitution. The plaintiff was therefore entitled to the declarations he sought (see paras 5–7).

(2) The defendant in intending to deprive the plaintiff of the vehicle had to comply with the provisions of the law, namely s 128 of the Act. Under s 128 of the Act if the defendant chose not to prosecute the plaintiff, it was duty bound to either release the goods seized or refer the matter within a reasonable time to the magistrate for his decision. In the present case, the defendant failed to comply with the provisions of s 128(3) of the Act despite the repeated demands by the plaintiff to claim for the return of the vehicle and this would entitle the plaintiff to recovery of the vehicle and damages (see para 9).

(3) Even if the defendant had complied with s 128 of the Act, the evidence adduced by the defendant in the instant case fell short of proving that the vehicle was smuggled into the country. Further, if the car was smuggled into the country, there was no action taken against the previous owner. Thus, it could be inferred that the vehicle may not be smuggled after all (see para 14).

[Bahasa Malaysia summary

Plaintif adalah pemilik kereta BMW ('kenderaan') yang ditahan dan dirampas oleh defendan berikutan notis perampasan ('notis') yang dikeluarkan di bawah s 135(1)(d) Akta Kastam 1967 ('Akta'). Notis tersebut menyatakan bahawa kenderaan dirampas atas alasan bahawa terdapat sebab munasabah untuk mengesyaki bahawa kenderaan adalah kenderaan 'uncustomed' atau terlarang pada masa ia dirampas. Plaintif mendakwa dia pembeli bona fide kenderaan tersebut, setelah membeli kenderaan tersebut daripada seorang yang bernama Yanty bt Mohamed melalui peniaga kereta. Dia oleh itu mendakwa bahawa penahanan dan perampasan kenderaan tersebut adalah salah dari segi undang-undang. Plaintif membuat beberapa percubaan untuk menuntut pemulangan kenderaan tersebut tetapi tiada jawapan daripada defendan. Plaintif kemudiannya memulakan tindakan ini terhadap defendan di mana dia memohon perisytiharan bahawa notis tersebut adalah salah dari segi undang-undang, terbatal dan tak sah, pemulangan kenderaannya dan juga pampasan untuk perampasan yang salah dari segi undang-undang tersebut.

Diputuskan, membenarkan permohonan plaintif dengan ganti rugi ditaksir atas permohonan dan kos RM7,000:

(1) Ia adalah undang-undang nyata bahawa 'reasonable cause to suspect' yang diperuntukkan di bawah s 114(1) Akta mesti wujud sebelum atau pada masa perampasan kenderaan dan bukan pada bila-bila masa selepas perampasan tersebut. Walau bagaimanapun, dalam kes ini pegawai yang melaksanakan perampasan dan mengeluarkan notis tersebut tidak

dipanggil untuk memberi keterangan mengenai alasan munasabah kesangsian yang wujud untuk kenderaan tersebut ditahan dan dirampas. Selanjutnya keterangan pegawai siasatan menunjukkan bahawa siasatan-siasatan atau penentusahan hanya bermula selepas kenderaan tersebut ditahan dan dirampas. Oleh itu, tidak terdapat alasan atau sebab untuk mengesyaki bahawa kenderaan adalah kenderaan 'uncustomed' atau terlarang pada masa ia ditahan dan dirampas. Dalam keadaan ini penahanan dan perampasan kenderaan tersebut bukan mengikut s 114 Akta dan mencabuli perkara 13(1) Perlembagaan Persekutuan. Plaintif oleh itu berhak kepada perisytiharan-perisytiharan yang dipohon (lihat perenggan 5–7).

(2) Defendan dalam berniat untuk menafikan plaintif terhadap kenderaan tersebut terpaksa mematuhi dengan peruntukan-peruntukan undang-undang, terutamanya s 128 Akta. Di bawah s 128 Akta jika defendan memilih untuk tidak mendakwa plaintif, ia bertanggungjawab sama ada untuk melepaskan barang-barang yang dirampas atau merujuk perkara tersebut dalam masa yang munasabah kepada majistret untuk keputusannya. Dalam kes ini, defendan gagal untuk mematuhi peruntukan-peruntukan s 128(3) Akta walaupun desakan berulang kali oleh plaintif menuntut untuk pemulangan kenderaan tersebut dan ini memberi hak kepada plaintif kepada pemulangan kenderaan tersebut dan ganti rugi (lihat perenggan 9).

(3) Walaupun defendan telah mematuhi s 128 Akta, keterangan yang dikemukakan oleh defendan dalam kes ini tidak membuktikan bahawa kenderaan tersebut diseludupkan masuk ke dalam negera. Selanjutnya, jika kereta diseludup masuk ke dalam negara, tetapi tidak terdapat tindakan diambil terhadap pemilik sebelumnya. Oleh itu, ia dapat disimpulkan bahawa kenderaan tersebut mungkin bukan diseludupkan (lihat perenggan 14).]

Notes

For cases on seizure in general, see 6 *Mallal's Digest* (4th Ed 2010 Reissue) paras 218–222.

Cases referred to

Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors [2009] 7 MLJ 609; [2009] 6 AMR 149, HC (refd)

Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249, FC (refd)

Legislation referred to

Customs Act 1967 ss 114, 114(1), 128, 128(3), (4), 135(1)(d)
Federal Constitution art 13(1)

Augustine Anthony (Augustine Anthony) for the plaintiff.
Azamuddin bin Abd Aziz (Senior Federal Counsel, Royal Malaysian Customs Department) for the defendant.

Harmindar Singh JC:

[1] The subject matter of this suit is a vehicle model BMW 735 IL (Auto) bearing vehicle registration number AGW 288 ('the said vehicle'). The plaintiff had purchased the said vehicle on 28 September 2009 from one Yanty bt Mohamed Taib through a car dealer in Kuala Lumpur. The vehicle was however seized by the defendant pursuant to a notice of seizure dated 13 October 2009. The plaintiff has now filed this action and seeks a declaration that the said notice was unlawful, null and void and unsupported by the law. He further claims that the detention and seizure of his vehicle was unlawful, null and void and seeks the return of his vehicle as well as compensation for unlawful seizure.

[2] Arising from the events that transpired leading to the seizure of the vehicle, the broad issues that arise for consideration of the court can be summarised as follows:

(a) whether the detention and seizure of the plaintiff's vehicle was unlawful or not in accordance with the law ('issue one'); and

(b) whether there had been non-compliance of s 128(3) of the Customs Act 1967, and if so, whether the plaintiff is entitled to the return of the said vehicle ('issue two').

ISSUE ONE

[3] The evidence at the trial disclosed that the said vehicle was seized pursuant to a 'Notis Penyitaan' dated 13 October 2009 ('the said notice'). The said notice stated that the said vehicle was being detained and seized on suspicion of an offence having been committed under s 135(1)(d) of the Customs Act 1967 ('the Act'). Now s 135(1)(d) of the Act provides that whoever knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods shall be guilty of an offence.

[4] The seizure of any such goods envisaged under s 135(1)(d) of the Act is allowed under s 114 of the Act which reads:

114. Seizure of goods the subject of an offence

(1) All goods in respect of which there has been, or mere is, reasonable cause to suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of mis Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters.

[5] It is trite law that the 'reasonable cause to suspect' provided under s 114(1) of the Act must exist before or at the time of seizure of the said vehicle and not anytime after the seizure (see also *Chia Sia Chek v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 7 MLJ 609; [2009] 6 AMR 149). It would also follow that in the absence of that reasonable cause prior to or at the time of detention and seizure, that seizure would become unlawful, null and void. It would be a violation of art 13(1) of the Federal Constitution which states 'No person shall be deprived of property save in accordance with the law.'

[6] Coming back to the instant case, it was unfortunate that the officer who effected the seizure and issued the said notice was not called to give evidence as to the reasonable grounds of suspicion that existed for the said vehicle to be detained and seized. This was further compounded by the evidence of the investigating officer ('SD1') and the exhibits produced which showed that whatever investigations or verifications only commenced after the said vehicle was detained and seized. Based on the sum total of the evidence adduced, it appeared that the defendant possessed no information, no material, no facts and therefore no grounds or cause to suspect that the said vehicle was an uncustomed or prohibited vehicle at the time it was detained and seized.

[7] In the circumstances, the detention and seizure of the vehicle was not in accordance with the law as set out in s 114 of the Act and therefore violated art 13(1) of the Federal Constitution.

ISSUE TWO

[8] In relation to the second issue, it was not disputed that the plaintiff was a bona fide purchaser of the said vehicle. He had purchased the vehicle and complied with all n the necessary provisions imposed by the law in getting himself registered as the lawful and registered owner of the said vehicle.

[9] It cannot be gainsaid that if the defendant had intended to deprive the plaintiff of the said vehicle, they had to comply with the provisions of the law. The relevant law applicable to the instant case is s 128 of the Act which reads:

> 128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month
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> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration —
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> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
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> (b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or
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> (c) such goods are returned under the said paragraph (a) or (b).
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> (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.
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> (3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.
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> (4) The Magistrate of the First Class shall issue a summons requiring the person asserting he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of section 115 as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be.
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> (5) In any proceedings under subsection (4), section 119 shall apply to the person

asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

[10] In this regard, the plaintiff had testified that he had made repeated attempts to claim for the return of the vehicle. This was not challenged and in any case it would be safe to assume that that is what any reasonable person in the position of the plaintiff would do if his property is seized. Getting no response from the defendant, the plaintiff had to engage solicitors who then wrote a letter dated 26 October 2010.

[11] The application of s 128 of the Act was clarified by the Federal Court in *Keng Soon Finance Bhd v Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 as follows:

> … The fundamental question that calls for determination is whether there is proof to the satisfaction of the court that an offence against the ordinance (similarly the Act) has been committed and whether the goods are the subject matter of the offence or, if it is a vehicle, whether it is used in the commission of such offence. In our view the distinction that emerges, upon construction of the effects of ss 127(1) and 128(4) of the Act, is essentially in regard to procedure. If there be no prosecution with regard to goods seized under the Act and there is a claim made to any such goods before the expiration of one calendar month from the date of seizure, the court shall, consequent upon the issue of summons requiring the appearance of the person asserting whom they were seized, examine the matter and on proof that an offence against the Act has been committed and that either (a) such goods were the subject matter, or, (b) if it was a vehicle, it was used in the commission of such offence before it, make an order for forfeiture.
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> On an enquiry pursuant to s 128(4) of the Act, the court shall examine all the evidence produced before it including that which may be tendered by the claimant in order to satisfy itself there is such proof. The court is competent in determining the matter before it to draw inferences from the facts proved. Proof on any other elements required to constitute an offence against the Act, such as knowledge or intent, is strictly a matter of inference to be deduced from the facts and circumstances surrounding each particular case where no presumption can properly be invoked.
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> If the court is satisfied after considering the whole of the materials before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such an offence, then, in that event, and not otherwise, it is mandatory for the court to make an order for forfeiture. It is our considered view that that is indeed the intention of the legislature underlying s 128(4) of the Act. In an appropriate case the court must give effect to the manifest intention of the legislature (per Abdul Hamid FJ (as he then was)).

[12] In the instant case, it was revealed that after investigations had been completed, there was no prosecution of any person in relation to the said

vehicle. In my view, when investigations are completed and there is no prosecution, and a claim is made for the seized goods and there is no intention to release the said goods seized, the matter must be referred to the court within a reasonable time as required by s 128 of the Act To be more specific, the defendant is duty bound under s 128(3) of the Act to either release the goods seized or refer the matter to a magistrate for his decision after an enquiry is held pursuant to s 128(4) of the Act. In other words, when there is no prosecution and there is a claim made by someone, the defendant or its officers cannot sit still and do nothing and wait for the aggrieved party to file a claim as the plaintiff has done in this case. Parliament has provided a clear and unambiguous process for the manner in which such cases are to be handled in the form of s 128 of the Act. And Parliament does not legislate in vain. To my mind, failure to act within a reasonable time is fatal as the goods seized may depreciate in value or have no value once they are seized and lie idle in the customs yard. Accordingly as well, I think it is too late now for the defendant to try and justify the detention and seizure of the vehicle. They should have done so in the enquiry before a magistrate.

[13] I am therefore constrained to hold that failure to comply with the provision of s 128(3) of the Act entitles the plaintiff to recovery of the said vehicle.

[14] Even assuming for a moment that the defendant had complied with the provisions of s 128 of the Act, the evidence adduced by the defendant in the instant case falls short of proving that the said vehicle was smuggled into the country. In particular, there remain serious questions as to how the said vehicle came to be registered in Malaysia. Furthermore, if indeed the car was smuggled into the country, why was there no action taken against the previous owner by the name of Yanty bt Mohamed Taib. As conceded by the investigating officer (SD1), she exists and is not a fictitious person. In fact, a statement was taken from her. So the inference that must follow is that the said vehicle may not be smuggled after all.

CONCLUSION

[15] In the circumstances, and for the reasons I have stated, the detention and seizure of the car was unlawful and the plaintiff is therefore entitled to the declarations he is seeking. Accordingly, I allow the prayers sought in para 12(i), (ii), (iii), (iv) and (v). This effectively means that the defendant is to return the

said vehicle to the plaintiff with damages to be assessed upon application. The plaintiff is also entitled to costs assessed, after hearing the parties, at RM7,000.

Plaintiff's application allowed with damages to be assessed upon application and costs of RM7,000.

Reported by Kohila Nesan